THE CLASSIFICATION OF TRUSTS AS EXPRESS, RESULTING, AND CONSTRUCTIVE.

IN view of the provisions of the Statute of Frauds, the common classification of trusts according to their mode of creation "into express trusts, implied trusts, resulting trusts, and constructive trusts," [1] and the proper definition of the terms used in that classification, are of interest and of value. An analytical examination of this particular classification of trusts leads to somewhat surprising conclusions and has its practical bearing on the applied law of trusts.

A conventional statement of the matter and a common arrangement of the terms were given by Maitland as follows:

"Trusts are created (1) by the act of a party, (2) by the operation of law. I do not think that these terms are unexceptionable, still they are well known and useful. A further classification has been made:

Trusts { By act of a party { Express. / Implied. } / By act of the law { Resulting. / Constructive." [2] }

Before scrutinizing closely Maitland's analysis, however, we must get some definitions of the terms, or at least must discuss details about the terms.

A. The Nature of Express Trusts, Implied Trusts, Resulting Trusts, and Constructive Trusts.

I.

Express and Implied Trusts.

Express trusts are, of course, trusts stated fully in language, when the language used is properly construed. There are (*a*) oral

[1] 1 Perry on Trusts, 6 ed., § 24.

[2] Maitland, Equity and the Forms of Action, 53.

express trusts, and (*b*) express trusts declared or manifested in writing.

Express trusts are usually contrasted with implied trusts.

"Implied trusts" is an ambiguous phrase. For instance, Perry on Trusts says:

"Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust." [3]

But that definition of implied trusts seems to be only a definition of those express trusts where the express language has to be construed. A trust is genuinely express even though the express language requires interpretation, if the express language, as construed, does state it fully.

On the definition of implied trusts Perry followed Lewin,[4] but in a passage that is helpful Maitland fortunately has refused to do so. He said:

"I have said now what I have to say about the creation of trusts by the act of a party. Lewin and other text-writers divide trusts thus created into express and implied. It is difficult to draw the line, for since no formal words are necessary for the creation of a trust, and since whenever the trust is created by the act of the party there almost of necessity will be some words used, — even if a deaf-mute created a trust by 'talking on his fingers' there would be words used, — the distinction comes to be one between clear and less clear words, and clearness is a matter of degree. Thus Lewin, under the head of 'Implied Trusts,' treats of cases in which a testator creates a trust by such words as 'I desire,' 'I request,' 'I hope.' No firm line can be drawn — 'I desire' is nearly as strong as 'I trust,' and 'I trust that he will do this' is almost the same as 'Upon trust that he will do this.' I do not therefore think that the distinction is an important one, and very often you will find that the term 'Express Trust' is given to all trusts created by act of a party, *i. e.*, by declaration, while 'Implied Trust' stands for what Lewin calls a trust created by act of the law." [5]

Perry's definition of implied trusts cannot be accepted, but neither can the phrase "implied trusts" be deemed synonymous

[3] 1 Perry on Trusts, 6 ed., § 25.

[4] 1 Lewin on Trusts, Flint's ed., 108, 130.

[5] Maitland, Equity and the Forms of Action, 75–76.

with "trusts created by act of the law," nor be deemed properly to embrace such trusts. To imply is to infer, and to infer is to deduce as a fact something as preëxisting. In the absence of evidence of an express trust, to infer from the conduct of the parties that a trust in fact exists is of course to imply a trust, and, as we shall see later, genuine resulting trusts are such inferred-as-a-fact or implied trusts. But where a trust is not inferred but is created, by act of the law administered by chancery, to prevent or to rectify the fraudulent enrichment of a wrongdoer, as every so-called constructive trust is, it is an imposed or fiat trust and is not an implied trust. It is only because constructive trusts are misnamed "constructive" that they have been called implied;[6] and now that this is apparent it is desirable to reject the customary definition of implied trusts and to limit the words "implied trusts" to trusts implied in fact, *i. e.*, to resulting trusts.

II.

Resulting or Implied-in-Fact Trusts.

In order to understand resulting trusts one must recall the law of resulting uses prior to the Statute of Uses. Before that statute there were three kinds of uses called resulting:

(1) The typical resulting use was the one held to exist where A., a fee-simple owner, made a feoffment to B. and his heirs; but B. gave no consideration, and A. declared no use in favor of B. or of any one else.

(2) Another kind of resulting use was that which existed where A. paid the purchase money for a conveyance of land by B. and

[6] In the phrase "constructive trust" the word "constructive" literally means ascertained by construction; but no constructive trust is really ascertained by construction, even where the intention of the parties is considered by the court in reaching the conclusion that there is unjust enrichment. Then, too, the word "trust" literally means that trust or confidence actually was reposed by the *cestui* in the trustee (see 1 Tiffany on Real Property, § 94, p. 233); but some constructive trusts are enforced where there was never for a moment any trusting of the trustee by the *cestui*. It is doubtless too late to hope to have a more accurate term displace "constructive trusts" as a name for the equitable obligations sought to be designated, but the same reason which impelled legal writers to deny that so-called quasi-contracts are "contracts implied by law" necessitates a denial that so-called constructive trusts are trusts "implied by law."

had B. make a feoffment in fee of the land to C., who was legally a stranger to A.

(3) Closely akin to the first kind of resulting use was the use found to exist where A. made the feoffment to B. and his heirs to the use of or in trust for C. for life, or on some other use which did not purport to dispose of the whole beneficial interest, or on a use which failed for some reason to take effect, and B. gave no consideration.

In case (1) the beneficial interest in fee resulted to A., but in case (3) only the undisposed of or ineffectually given part of the fee of the use belonged to A.

In each of the above-mentioned three kinds of uses named "resulting," the reason why the court of chancery indulged a presumption of fact that the land conveyed was held on a use for the feoffor or for the payer of the purchase money, was mainly because of the lack of consideration on the part of the feoffee, though that lack of consideration was significant only because feoffments on oral trusts for the feoffor had become so common that it was fair to assume that any feoffment not paid for by the feoffee, and not expressly made to the use of the feoffee or of another, was intended to be to the use of the feoffor, or of the third person, who paid the feoffor the purchase price and thus occasioned the feoffment. The presumption of fact of a use, like every other genuine presumption of fact, was deemed rebuttable in each case, however, and, it being established that no consideration was paid by the feoffee,[7] the proper way to rebut it was to show that at the time of the feoffment a statement was made by the feoffor in the first and third kinds of so-called resulting uses, and a statement was made by the payer of the money in the second kind, that the feoffee should hold either to his own use or to the use of some third person. If one asks why chancery indulged the presumption of fact of a taking on a use or trust in these resulting-use cases, the answer, already foreshadowed above, is that the court of chancery took judicial notice of the vast number of feoffments on use which were being made. From the time when conveyances to uses became common down

[7] Where the estate conveyed was less than the fee owned by the feoffor, and therefore involved the assumption of duties or liabilities by the one to whom it was conveyed, that assumption was regarded as consideration sufficient to make a presumption of resulting use unfair. See Castle *v.* Dod, Cro. Jac. 200.

to the Statute of Uses, it was very rational for chancery to take such notice and to indulge that presumption.

Then came the Statute of Uses. Its aim was to end the conveyance-to-uses orgy, — the old passive trust régime, — and that aim succeeded. It was not until about a century after the Statute of Uses was passed that the passive trust — the modern passive use to which the Statute of Uses does not apply — made its appearance;[8] and this later passive trust never was widely adopted, because the reasons which led to the vogue of the passive use had mainly ceased to exist.[9] Accordingly, when chancery recognized the passive trust despite the Statute of Uses, and thus gave a use on a use its proper effect, the old presumptions of fact which led to resulting uses were not properly resorted to for the purpose of recognizing and enforcing resulting trusts. Still those presumptions persisted to some extent, though to how full an extent in England is not wholly clear. Since they have persisted, it is desirable to consider the presumptions which to-day are indulged in each of the situations in which originally resulting uses were raised.

The first resulting-use situation noted above was that of a conveyance without consideration. It is commonly believed that after the Statute of Uses if A., without consideration and without declaring a use, made a feoffment to B. and his heirs, the old presumption of a resulting use to A. in fee prevailed, and the Statute of Uses converted the presumed resulting use into the legal fee and nullified the feoffment.[10] There is, however, a *dictum* of Lord Holt's to the contrary.[11] If the commonly accepted doctrine was correct there was no need for a resulting trust in such case, as A., because of the statute, still owned the realty. On that theory there could be a question of resulting trust on a conveyance without consideration made by A. to B., only if the conveyance operated under the Statute of Uses or consisted of a common-law lease and a release.

A genuine bargain-and-sale deed required a valuable considera-

[8] See Ames, Lectures on Legal History, 246; 21 HARV. L. REV. 261, 273.

[9] "Passive or simple trusts are not common in this country, and in some states it is provided by statute that the legal title shall vest in the *cestui que trust*." 1 Tiffany on Real Property, § 95, p. 236.

[10] 1 Tiffany on Real Property, §§ 89, 93.

[11] See Shortridge *v.* Lamplugh, 2 Ld. Raym. 798, 801–802.

tion, of course, namely, "money or money's worth";[12] so in the case of such a conveyance there was no chance for a resulting trust to be raised for want of consideration. A genuine covenant to stand seised to uses, "the consideration being blood or marriage,"[13] was usually in favor of a wife or child as against whom equity would indulge no presumption of trust, but in whose favor, on the contrary, it would indulge a presumption of gift or advancement; so here again there was in general no chance for a resulting trust to be presumed from want of consideration. However, by common-law lease and release, a method of conveyance not requiring livery of seisin, but requiring entry by the lessee to qualify him to get title by the deed of release, title could be passed without consideration. Then when the Statute-of-Uses method of conveyance by lease and release, which required in theory only the most insignificant consideration, and in practice no consideration, for its effectiveness,[14] was invented, it became perfectly possible, and quite common, to transfer real property without entry into possession by the tenant, without livery of seisin and without consideration.

But in both the common-law lease and release and the Statute-of-Uses lease and release there was a stated consideration, and in addition in the Statute-of-Uses lease there was in the judgment of the common-law courts a use raised which the statute executed,

[12] Goodwin, Real Property, 349.

[13] Id. 351.

[14] "The fact that the bargain and sale for a year, which was the foundation of the conveyance by lease and release, was expressed to be made for a nominal consideration that was in fact never paid, does not form any exception to the rule that a bargain and sale must, in order to take effect as a bargain and sale, be made for valuable consideration. The lease did not operate as a conveyance until it was perfected by the release; and both stages formed together one transaction. The acknowledgment of the fictitious consideration in the lease operated as an estoppel at law, and by the release, even though it were made for no consideration, the assurance became complete at law, without any need to resort to the equitable doctrine of bargains and sales. This assurance is therefore no exception to the rule, because it did not take effect by the means contemplated by the rule. If the validity of the use declared by the lease could have been raised in equity, as a substantive question, upon general principles it would have been permissible in equity to adduce evidence of the fictitious character of the consideration, and this might in equity have been fatal to the validity of the use. But the whole transaction was complete at law, where the doctrine of estoppel precluded all evidence touching the consideration; and when it had been completed at law, there existed no equity (except under special circumstances such as fraud, which are not in contemplation) to disturb the transaction." Challis's Real Property, 3 ed., 420.

and the right of chancery to presume a resulting trust in either case was not even urged for a long time. As late as 1740 Lord Hardwicke stated in substance in Lloyd *v.* Spillet [15] that the Statute of Uses and the Statute of Frauds left room for only two kinds of resulting trusts, and the kinds he named did not include the kind where a grantee without consideration, or on a nominal consideration, is presumed to hold for the grantor. The soundness of Lord Hardwicke's view of the English law is doubtful, as is shown by the fact that Lewin [16] and Maitland [17] regard a presumption of a resulting trust for the grantor where no consideration is paid, as still entertained in England. Whatever the rule in England may be, in this country there certainly is no such presumption of a resulting trust where the deed of conveyance either recites a consideration or states that the grantee is to hold to his own use; and of course only a freak conveyance could fail to do one of those two things.

Perhaps the most convincing way of putting the refusal of American courts to presume and enforce a resulting trust in favor of the grantor just because for no actual consideration he conveys by a deed which recites a consideration, or declares that the grantee is to hold to his own use, is found in the statement of Cope, J., in Russ *v.* Mebius,[18] that "The doctrine of resulting uses and trusts is founded upon a mere implication of fact made by law, and in general this implication cannot be indulged in favor of the grantor where it is inconsistent with the presumptions arising from the deed." The reason, however, why we find the presumptions or inferences of fact from the deed, is, of course, that to-day instead of the vast majority of titles to realty being held on secret oral trusts, only a very limited minority can be said to be held in that way. The real justification for the refusal to presume a resulting

[15] 2 Atk. 148, Barn. 384.

[16] Lewin on Trusts, Flint's ed., 144; id., 12 Eng. ed., 164.

[17] "For no valuable consideration I convey land unto and to the use of A. and his heirs. Here the use does not result, for a use has been declared in A.'s favor, so A. gets the legal estate; but in analogy to the law of resulting uses the court of chancery has raised up a doctrine of resulting trusts. If without value by act *inter vivos* I pass the legal estate or legal rights to A. and declare no trust, the general presumption is that I do not intend to benefit A. and that A. is to be a trustee for me. However, this is only a presumption in the proper sense of that term and it may be rebutted by evidence of my intention." Maitland, Equity and the Forms of Action, 79.

[18] 16 Cal. 350, 357 (1860).

trust in favor of a grantor who conveys without consideration is that such a presumption would in the ordinary case be in opposition to the real intentions of the parties, and that chancery takes judicial notice of that fact.

While in this country we do not, in general, presume a trust for the grantor in the case of voluntary conveyances, we have no hesitancy in either presuming a resulting trust for the grantor, or by construction finding the express trust to give the equitable interest to him, in those cases in which the voluntary grantee takes the legal title to his own use but expressly "in trust nevertheless," and the trusts declared fail in whole or in part, and in which no rule of public policy nor countervailing presumption prevents the grantor from taking the equitable interest,[19] or in presuming a resulting trust where A. pays B. the purchase money for realty which B., at A.'s request, conveys to C. and his heirs "to the use of C. and his heirs." [20] A declared use to the grantee and a stated consideration inserted in the deed to C. not preventing the construction of a trust or the presumption of a resulting trust in such cases,[21] it is easy to see that in any case where without an actual consideration, but with a stated consideration, a conveyance is made by a grantor to a grantee who, by the terms of the deed, is to hold to the grantee's own use, a resulting trust might possibly be presumed. The statement in the deed that the grantee is to hold *to his own use* might easily be deemed to fulfil its whole function in preventing the presumption of a resulting *use*, to which the Statute of Uses could apply, and hence to interfere in no way with the presumption of a resulting *use on a use*, *i. e.*, a resulting *trust;* and the only reason why this is not the American method of dealing with the deed is that we believe that to imply such a resulting trust would in nine

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[19] If the conveyance was on a full payment for the land made by a third person, a resulting trust should be found for him rather than a trust for the grantor. Heiskell *v.* Trout, 31 W. Va. 810, 8 S. E. 557 (1888); *In re* Davis, 112 Fed. 129 (1901).

[20] See Stratton *v.* Dialogue, 16 N. J. Eq. 70 (1863); Cotton *v.* Wood, 25 Ia. 43 (1868). In Stratton *v.* Dialogue, *supra*, Green, Ch., said: "The material question in the case is, whether the land was in fact paid for with the funds of the company. If it was, there is clearly a resulting trust in favor of the company, although the deed is made absolute to Dialogue, and purports upon its face to be for his own use and benefit." 16 N. J. Eq. 70, 71.

[21] The leading American case on the stated consideration point is Boyd *v.* McLean, 1 Johns. Ch. (N. Y.) 582 (1815). For other cases see 39 Cyc. 158, note 49.

times out of ten defeat the actual but accidentally unprovable intention of the parties.

But while in the United States there is properly a presumption against a resulting trust for the grantor on a conveyance for a stated consideration or on a declared use, the general American doctrine that there is a conclusive presumption against an implied trust of any kind in such a case is indefensible. It is often said in justification of the American doctrine just stated that, "in conveyances that are in form deeds of bargain and sale, parol evidence cannot be received to control or contradict the statement of the consideration,"[22] and that the recitation in any deed that the grantee is to hold to his own use conclusively rebuts the presumption of a resulting trust, "as it is a rule that when a use is declared no other use can be shown to result";[23] but neither statement is a justification. In all jurisdictions equity does go behind the recitations of consideration and of use in a deed in order to enforce a constructive trust against a voluntary grantee who agreed orally to hold in trust for the grantor, and now refuses to perform and relies on the parol-evidence rule and on the Statute of Frauds, provided that the oral promise of the voluntary grantee was made with the actual secret intent on his part not to perform, or the deed was obtained by undue influence, or there was a special confidential relationship which equity will not permit to be violated through the breach of the oral promise; and since equity can go behind those recitations in some cases, it can go behind either or both of them in any case where it is desirable to do so, for equity need never regard mere form. The statement that the declared *use* necessarily prevents a presumption of resulting *trust* is unsound. The declared *use* prevents a presumption of a resulting *use*, of course, and therefore, because of the stated use, the Statute of Uses cannot revest the legal title in the grantor; but while the legal title must remain in the grantee, a resulting *trust* might be presumed if it seemed fair; and even though a resulting trust should not be presumed, a constructive trust might well be enforced where an express oral agreement to hold in trust and an unjust enrichment in breach of it are shown. To indulge a presumption of fact against a trust under such a deed is one thing, but to refuse to let that presumption or

[22] 1 Perry on Trusts, 6 ed., § 162, p. 254. [23] Id. p. 255.

any other be rebutted where a trust was actually intended and undertaken and, in consequence, to allow unjust enrichment, is quite a different thing. Whether such refusal to permit the presumption to be rebutted is based on the parol-evidence rule or on the Statute of Frauds, it is historically and logically unsound.[24]

So much for the first kind of resulting trust urged on the analogy of the first kind of resulting use.

The second kind of resulting use — that presumed because one man paid the purchase money and the deed was taken to another who was not so related to the payer that the presumption seemed unfair — was made by chancery the model for a similar presumed resulting trust, and, accordingly, a rebuttable presumption of a trust for such a payer is indulged, wherever by statute the rule has not been changed.[25]

The third kind of resulting use mentioned above was the prototype for a similar kind of trust customarily called a resulting trust.

Pomeroy splits that kind of trust — called by him a resulting trust — into two subdivisions; but that seems unnecessary. Under the general head of "trust resulting to the donor" Pomeroy has three subdivisions, the third being the case of conveyances without consideration already discussed, and the other two being stated as follows:

"1. Where property is conveyed by will or deed upon some particular trust or particular objects, and these purposes fail in whole or in part, or the particular trusts are so uncertain and indefinite that they cannot be carried into effect, or they lapse, or they are illegal, — in all of these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor, or the heirs, residuary devisees or legatees, or personal representatives of the testator. . . .

"2. . . . A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the equitable estate, or conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the

[24] For a refutation of the parol-evidence rule argument, see the concurring opinion of Connor, J., in Gaylord *v.* Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909). A refutation of the Statute-of-Frauds argument is attempted later in this article.

[25] The justifiableness of that presumption in our time has well been doubted. Ames, Lectures on Legal History, 431, 434; 20 HARV. L. REV. 549, 555–557. It is there pointed out, however, that a statutory or other conclusive presumption against a trust is even more unjustifiable.

part of it undisposed of in the other, will, in general, result to the grantor, or to the heirs or representatives of the testator." [26]

Most of Pomeroy's second subdivision has practically been eliminated in the United States by the rule of construction which cuts down the legal estate expressed for a trustee to one no greater than he needs for the proper execution of the trust, and which therefore gives a grantor, or the heir or residuary devisee of a testator, a legal interest where once he would have had a resulting equitable interest. In the United States this rule of construction applies to deeds of trust as well as to devises in trust; [27] but in England, though the rule applies to wills, it seems not to apply to deeds, because "there the construction adheres more strictly to the letter." [28]

The two subdivisions mentioned in the passage quoted from Pomeroy are essentially one, for in both the court of chancery concludes that the grantee is not to keep any undisposed-of beneficial interest despite a stated consideration in the deed and despite an *habendum* to the use of the grantee. The words "in trust nevertheless" following the *habendum* clause are sufficient to show that if the trust for any reason fails to take effect, the voluntary grantee is not to keep for himself.

Before the statute of uses, then, there were three kinds of resulting uses, namely: (1) Where by feoffment, fine, or recovery, the full legal title which the grantor had was transferred without consideration and without the declaration of a use, there was a resulting use to the grantor; (2) where by feoffment, fine, or recovery, or common-law lease and release, made for consideration paid by one person, the legal title was conveyed to another who was a legal stranger to the payer, there was a resulting use to the payer of the consideration unless the payer did something to negative it; (3) where by feoffment, fine, or recovery, without consideration, or by common-law lease and release, without consideration, a use was declared which did not exhaust the equitable interest which would have resulted if no use had been declared, there was a resulting use to the grantor to the extent that the use declared did not exhaust that interest.

[26] 3 Pomeroy, Equity Jurisdiction, 3 ed., §§ 1032, 1034.

[27] 1 Perry on Trusts, 6 ed., § 319.

[28] Lewin on Trusts, 12 Eng. ed., 241. See also 1 Perry on Trusts, 6 ed., § 319.

Since the Statute of Uses, the first kind of resulting use has commonly been supposed to continue, and though that may be doubted,[29] the fact that feoffments, fines, and recoveries have long been obsolete makes the question wholly a moot one. But after chancery saw the fraud permitted by the Statute of Uses and stopped it by recognizing and enforcing passive trusts — uses on uses — and after it became possible, by so-called bargain-and-sale leases and releases, operating under the Statute of Uses, to convey a fee without consideration, and without entry under a lease or livery of seisin, the question whether a resulting trust corresponding to the first kind of resulting use mentioned above should not be presumed on a conveyance without consideration by a common-law lease and release or by a bargain-and-sale lease and release, became a practical one. As we have seen, some prominent English writers believe that there is in England such a resulting trust corresponding to the first kind of resulting use, but in the United States the notion that such a trust should be presumed is not entertained. But in both England and the United States trusts corresponding to the second and third classes of resulting uses above mentioned, and in both instances commonly called resulting trusts, have been and are to-day presumed and exist. We shall have occasion, however, to question the correctness of the name "resulting trust" as applied to the third class of trusts.

III.

Constructive Trusts.

Constructive trusts are not easy to define. They comprise all trusts recognized and enforced by chancery that are neither express trusts nor resulting trusts. Express trusts and resulting trusts are trusts by the real or the presumed intention of the parties,[30] but constructive trusts are trusts *in invitum*. A con-

[29] See note 11, *ante*.

[30] With reference to resulting trusts as intention trusts, an interesting question may arise. Whose intention, for instance, is presumed or must be presumed? Suppose, for example, that A. pays the purchase price for land bought from B. and the conveyance is made to C., a legal stranger to A., but without any knowledge on B.'s part that A. has anything to do with the sale. It would, of course, be held that a resulting trust exists in the absence of affirmative proof of a gift as intended by A. to C., and the

structive trustee may, indeed, have started out as an express or resulting intention trustee, and then have repudiated the trust in reliance on the Statute of Frauds or the Statute of Wills or some other statute, or in reliance on the parol-evidence rule; but in such case it was not until he repudiated the express trust that he did or could become a constructive trustee. *Qua* constructive trustee — as where his repudiation with retention of the trust *res* constitutes a gross violation of a special confidential relation — he is from the start a resisting and not a consenting or intention trustee.

Constructive trusts are preëminently trusts which in current court language are called "implied by law." "Implied by law" is, however, an erroneous designation, because "implied" means "inferred," and a constructive trust is not "inferred," but instead is created for the first time and imposed on the trustee because of his fraud. In a sense resulting trusts are implied by law, because it is the court that indulges the presumption of fact;[31] but since

necessary consequence of such a holding would be that B.'s intentions are immaterial. But is that consistent with the rule as to express trusts? One supposititious case will demonstrate that it is. If A. and C. agree in writing that C. shall obtain from B. a deed to land that B. has to sell, that A. through C. shall pay the purchase price, and that C. shall hold the title so acquired in trust for A., and if B. makes the conveyance without any knowledge that A. is interested, the trust by which C. is bound is clearly an express intention trust. Since in the case of an express trust of the kind supposed the only parties who must have trust intentions are the payer of the purchase money and the one who takes the title to the property bought, it would seem clear that the only intention that need be presumed in the case of a resulting trust of the same kind to make it an intention trust is the intention of those same parties. If the vendor of the property knew of the relations between his grantee and the payer of the purchase money and purported to express the trust in his deed, that fact might raise some question as to the proper writing to look to as proof of the terms of the express trust, but it would not make the trust any more an intention trust. The same thing is true of the knowledge of the vendor in the third-person-payer resulting trust case, and in consequence the vendor's knowledge that his grantee is not paying for the property himself need not be presumed.

[31] That is the sense which justifies the view that they come under section eight of the Statute of Frauds instead of under section seven. In writing of the history of assumpsit Dean Ames said: "The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law." Ames, Lectures on Legal History, 154. See same passage in 2 HARV. L. REV. 53, 58. While chancery got the conception earlier than the law courts did, as Dean Ames also pointed out (Ames, Lectures on Legal History, 154; 2 HARV. L. REV. 53, 60), and the resulting-use doctrine was one of the consequences of chancery's acceptance of implications of fact, the chancery judges have been behind the law judges in discriminating between implications of fact and so-called "im-

the presumption of a resulting trust is in essence one of fact, such a trust is presumed as an actually intended trust and so is fundamentally not implied by law. A resulting trust, properly so called, is a law-inferred-as-a-fact trust; a constructive trust is a law-imposed trust.

With reference to constructive trusts the important question is, What are the essential ingredients of such a trust? It is common to speak of a constructive trustee as an *ex delicto* or *ex maleficio* trustee, and it is said that a man must be guilty of fraud before he can be deemed a constructive trustee. It is no doubt too late to quarrel seriously with that way of stating the matter, but though it is necessary to accept that language, the acceptance must be with explanations and conditions. The first condition is that regardless of whether the subdivision of fraud into (1) actual fraud and (2) constructive fraud is in general to be commended, — no doubt it is not to be approved,[32] — the admission that a construc-

plications of law." While the general distinction between contracts implied in fact and quasi-contracts is being emphasized by law judges to-day, the fact that a resulting trust is implied in fact and that a constructive trust is an equitable quasi-contract is being overlooked. It is being assumed to-day, just as it was assumed by the authors of the Statute of Frauds, that a resulting trust is implied by law just because the law announces that a rebuttable presumption of intention is applicable on proof of certain facts. That assumption is wrong, but section eight of the Statute of Frauds was framed by those who believed it to be the right assumption, and, in consequence, resulting trusts have properly been deemed trusts which "arise or result by the implications of law" within the meaning of those words in that section. While resulting trusts properly fall under that section, the wording of that section should not prevent a realization that resulting trusts are after all implied in fact and not implied by law, and that no trusts are properly to be called "implied by law."

[32] "It must be remembered that for a long time equity judges and text-writers thought it necessary or prudent for the support of a beneficial jurisdiction to employ the term 'fraud' as *nomen generalissimum*. 'Constructive fraud' was made to include almost every class of cases in which any transaction is disallowed, not only on grounds of fair dealing between the parties, but on grounds of public policy. This lax and ambiguous usage of the word was confusing in the books and not free from confusion in practice. Plaintiffs were too apt to make unfounded charges of fraud in fact, while a defendant who could and did indignantly repel such charges might sometimes divert attention from the real measure of his duties. Cases in which there was actual fraud or culpable recklessness of truth were not sufficiently distinguished from cases in which there was only a failure to fulfil a special duty. But it seems needless at this day to pursue an obsolete verbal controversy." Pollock, Contracts, 8 ed., 556. Unfortunately the controversy is not obsolete in the United States, even if it is in England; and with us it is still advisable to resort at times to the phrase "constructive fraud" to keep a defendant who indignantly denies actual fraud from diverting "attention from the real measure of his duties."

tive trust is a fraud trust can be made on no other terms than the retention of both actual fraud and what has been called "constructive fraud" as fraud. One illustration will make this clear. A., the express trustee of a secret trust, makes a deed of gift to B. of forty acres of the trust *res*. The deed recites a consideration and states that B. is to hold to his own use. B. takes innocently, but later C., the *cestui que trust*, learns of the transaction and demands that B. deed back the property, and A., the guilty trustee, unites in the demand. B. refuses to deed back the property. Here B. is not an express trustee, and he is not a resulting trustee. Is he a constructive trustee? If actual fraud were necessary to make him a trustee, most jurisdictions would have to say that he is not one; for in most jurisdictions actual fraud would not be deemed to exist unless B. acquired the property by resort to artifice, trick, or design, or with knowledge that the trustee was giving him trust property. But, in the case supposed, actual fraud, so defined, did not exist and, what is more, is not deemed essential in any jurisdiction to the enforcement of a constructive trust in such a case. B.'s insistence on retaining his legal advantage for which he gave no consideration, after learning that A. conveyed in breach of trust, is just as bad as a fraudulent acquisition would have been, and is so called "constructive fraud" which equity makes the basis of a constructive trust. While the courts frequently forget the fact in the Statute-of-Frauds cases, fraudulent retention, *i. e.*, retention of the property with "constructive fraud," after innocent acquisition, is just as satisfactory a basis for a constructive trust as is fraudulent retention after fraudulent acquisition. Both ought to be recognized as actual fraud — fraud at the end is as much fraud as is fraud at the start — but whether fraudulent retention is called actual fraud or constructive fraud, it is sufficient justification for raising a constructive trust.

The defendant's intent to retain the property existing at the time when he refuses to give it up and when it is a violation of good faith or of common honesty for him to retain it, is, then, the only fraudulent intent which equity needs to justify it in declaring a constructive trust to exist and in awarding a remedy.[33]

[33] Some of the Statute-of-Wills cases make this clear. See, for instance, Powell *v.* Yearance, 73 N. J. Eq. 117 (1907); Winder *v.* Scholey, 83 Ohio St. 204, 216, 93 N. E. 1098 (1910).

B. Classification.

Now that we have some acquaintance with our terms, the real questions of classification can be confronted, and at the start it seems desirable to emphasize the often-forgotten fact that the fundamental reason for enforcing an express trust is the same as that for enforcing a resulting trust and is the same as that for enforcing a constructive trust. In classifying it is usually more important to emphasize differences than similarities, but now that we have marked off resulting trusts as implied in fact and constructive trusts as imposed by law, and have distinguished both, therefore, from express trusts, it would seem to be of very considerable practical importance to show their really close relation. To do so, it is only necessary to answer the question, Why does equity recognize and enforce a resulting trust? Where A. pays the purchase money for land owned by B. in fee, and B. at A.'s request conveys to C. in fee, we say that there is a resulting trust, because C. is presumed to have agreed, *i. e.*, has by conduct agreed, to hold in trust. It is a promise by act, as distinguished from an express oral or written promise, but nevertheless is an actual promise. But why should chancery make C. perform that implied-in-fact promise or make the trustee of an express trust perform his express promise? The question is not whether in the resulting trust case supposed the Statute of Frauds should be a defense to C., for clearly that statute was not intended to interfere with resulting trusts; but the question is whether equity has any good reason to give for enforcing at all a resulting trust or an express trust. The answer of chancery judges to that question, and their only possible answer, is that it is against conscience to permit C. to enrich himself at A.'s expense contrary to the ascertained intention of the parties, by repudiating his implied-in-fact promise or his express promise and keeping the property. But unjust enrichment is just as much the basis of a constructive trust as of a resulting trust or of an express trust, even though the constructive *cestui* should be deemed to have a quasi-contractual claim against the constructive trustee; for chancery does not regard the money judgment that would be rendered on that quasi-contractual claim as an adequate remedy, and offers its own adequate remedy to prevent the unjust enrichment. A resulting trust, unlike a constructive trust, is an intention trust, but an intention trust, whether an express or an

implied-in-fact trust, is enforced for the very same fundamental reason that a constructive trust is, namely, to prevent the unjust enrichment of the fraudulent retainer of the property. We are too apt to forget that the sole reason why chancery took jurisdiction to enforce uses, the earliest trusts, was to prevent the unjust enrichment by feoffees through their fraudulent retention of land conveyed to them in use or confidence, and that to-day there is no other reason for chancery's enforcement of any kind of a trust.[34]

In the case of express trusts the trust will everywhere be enforced regardless of whether the fraud consists of fraudulent acquisition and fraudulent retention combined or only of fraudulent retention. In the case of resulting trusts the same thing is true. But some courts hesitate to raise constructive trusts in the Statute-of-Frauds cases on fraudulent retention alone, though it is fraudulent retention and not fraudulent acquisition that injures the defrauded party and enriches the fraudulent party, and though the same courts in effect recognize the truth of that statement whenever they enforce a resulting trust in favor of the payer of the purchase money against a grantee who took innocently but afterwards decided to retain the trust *res* for himself through the aid of the parol-evidence rule or of the Statute of Frauds or of both. However inconsistent in granting and in withholding relief in the trusts cases some courts may be, the proper principle for their guidance is clear the moment the essential reason for the recognition and enforcement of trusts — the rectification of unjust enrichment — is seen to be the same for all trusts, whether they are express or implied, and whether, if not express, they are resulting or constructive.

With this explanation, we may now proceed to consider the classification problems in more detail.

I.

Express Trusts.

Express trusts heretofore have needed practically no subdivision. By reason, however, of the somewhat old use in the books of the word "implied" to describe what are really, in a fair sense, only express trusts, it will be well to divide express trusts into (1) Ex-

[34] This is common historical knowledge. See Ames, Lectures on Legal History, 237–238; 21 HARV. L. REV. 265.

press trusts manifest without interpretation, and (2) Express trusts ascertained, clarified, and defined by construction.[35]

The first class of express trusts needs no elaboration, but the second class of express trusts requires further subdivision.

One subdivision of that second class of express trusts will consist of precatory trusts, *i. e.*, trusts "created by certain words, which are more like words of entreaty and permission than of command or certainty." [36]

Another subdivision, it seems, will be comprised of one of the trusts commonly regarded as resulting, namely, the kind of trust which Pomeroy splits into two subdivisions, as noted on p. 446, *ante*. Where property is conveyed by deed without consideration, or is disposed of by will, in trust, but the trusts specified fail in whole or in part, it is customary to say that there is a resulting trust to the grantor or to those who have succeeded either to his rights or to those of the testator. Is this a real resulting trust, *i. e.*, a genuine implied-in-fact trust, or is it something else? While at first sight the idea seems strange, it is probable that it is an express trust ascertained by construction. The current assumption that the trust is resulting is made in forgetfulness of the fact that construction involves inferences of fact. The question, then, is whether in the case of this kind of a trust inferences of fact have to be used to an extent not reasonably to be regarded as justifiable in cases of mere interpretation. In the trust supposed, the clearly express trust is the trust which fails. Then the question is whether the trust which is enforced for the grantor or his heir, or for the residuary devisee or the heir of the testator, is also express or is implied in fact. It seems to be a case of what may be called indirect or negative construction, *i. e.*, construction by elimination. Knowing

[35] The word "construction" is here meant to include both the ascertainment of the actual intention of the creator of the trust, as revealed in the express words of the trust, and the adoption of what the court believes from the revealed actual intention would have been the intention of the creator of the trust if the situation calling for definition of the trustee's powers and duties under the express trust, or for a determination of the equitable interests which the trust gives rise to, had presented itself to his mind. Compare Gray's Nature and Sources of the Law, § 370 (interpretation of statutes), and §§ 702–705 (interpretation of wills). Although some day it may be well to discriminate in terminology these two very different exercises of the judicial function, necessity has not yet forced that discrimination on us in the law of trusts.

[36] Black's Law Dictionary, 928. That precatory trusts are express trusts ascertained by construction is clear. See 1 Pomeroy, Equity Jurisprudence, 3 ed., p. 178, n.

the interest which the grantor or the testator had, the court construes the conveyance or will and finds that all not effectually conveyed remained at law in the grantor, or by analogy vested in the grantor in equity, immediately upon the conveyance, and that all not effectually devised to the *cestuis* vested in the testator's heir or in the residuary devisee. The direct or positive construction consists in ascertaining the property interest of the express *cestuis;* but as the property interest of the grantor, or of the successor in interest of the testator, is figured out by deducting the property interests of the express *cestuis*, ascertained by positive construction, from the total property interests to be disposed of, that deduction would seem to be still part of the construction of the express trust, even though it is only a by-product part. To be sure, a presumption that there is no trust for the grantor is raised by the stated consideration or by the use *habendum* in the deed or by both; and a presumption that there is no trust for the testator's successor in interest is raised because the testator, anticipating death, does not expressly provide for the successor in interest, but in each case that presumption is overcome by the "in-trust-nevertheless" clause in the deed and the "in-trust" clause in the will. Where the voluntary deed or devise is expressly "in trust" and the trusts fail, the "in-trust" clause keeps the deed or will from carrying a conclusive or other presumption of gift. The words "in trust" are words which raise a presumption that a gift to *cestuis* and not to the grantee was intended, and which therefore make rational the presumption of fact that the portions of the equitable interest which are unclaimable by the intended *cestuis* were intended to belong to, and so are unreflectingly but plausibly said "to result to," the creator of the trust or his successors in interest. Those presumptions are interpretation presumptions, it would appear. Surprising as it may be, this kind of a trust seems, then, fairly to be classified as express by construction.

II.

Resulting Trusts.

As we include under express trusts those trusts defined by construction which many writers have called implied,[37] the term

[37] A vendor against whom a bill for specific performance will lie is often spoken of as a trustee, and in Felch *v.* Hooper, 119 Mass. 52 (1875), it was deemed by the court

"implied" can be utilized to cover, as already noted, resulting trusts. True resulting trusts are implied in fact, and they are the only implied trusts properly so called.

Implied-in-fact trusts give us our first serious classification problem. The typical resulting trust is implied in fact, but some so-called resulting trusts can be regarded as implied in fact only by a resort to a very artificial reasoning.

Take the case where A. pays B. the purchase price for property and has B. convey it to A.'s wife, C., who receives it on an oral trust for A. From the fact that C. is A.'s wife there is a presumption of a gift to her by A., but as this presumption is rebuttable the oral trust may be proved to rebut it. The presumption of gift having been rebutted, equity makes C. hold as trustee for A. despite C.'s plea of the Statute of Frauds and despite the fact that C. may have taken with innocent intent and have decided to keep for herself only after quarrels between her and her husband took place or some other occurrence influenced her.[38] So chancery will make

that the land contracted to be sold was "charged with an implied trust" within the meaning of a statute which gave the court power, on service by publication, to decree a conveyance by a non-resident person "seised of an estate upon a trust express or implied," and to appoint some suitable person to make the conveyance. This case was one where on a bond for conveyance given by the vendor the vendee had paid part of the purchase money, entered into possession of the land, made improvements thereon, and tendered the balance of the purchase price, and the court seemed to think that because the part payment and the tender of the balance of the purchase price had to be shown *dehors* the bond the trust was implied and not express. Colt, J., said for the court:

"This statute expressly includes implied trusts and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute."

It is believed, however, that the trust, if it really was a trust within the meaning of the statute, was an express trust found to be such by construction, and that by "a trust . . . implied" was probably meant a resulting trust and a constructive trust only. The bond for title was certainly an express contract and if equity says that the vendor was a trustee because of his contract obligations, he was of course an express trustee. This is none the less true although he would have been astonished to be told that he was an express trustee. That he was seised of an estate upon express trust within the meaning of the words in that Massachusetts statute, if he was a trustee at all within the intent of that statute, seems reasonably clear. On whether he was a trustee, see Merrill *v.* Beckwith, 163 Mass. 503, 40 N. E. 855 (1895).

[38] Smithsonian Institution *v.* Meech, 169 U. S. 398, 18 Sup. Ct. 396 (1897); Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750 (1896); Short *v.* Short, 62 Ore. 118, 123 Pac. 388 (1912). See Harden *v.* Darwin, 66 Ala. 55 (oral trust performed) (1880); Carpenter *v.* Gibson, 104 Ark. 32, 148 S. W. 508 (oral trust not proven) (1912). But see Kinley *v.* Kinley, 37 Colo. 35, 86 Pac. 105 (1906); Murray *v.* Murray, 153 Ind. 14, 53 N. E.

C.'s heirs or devisees hold in trust for A. despite their plea of the Statute of Frauds, and despite the fact that C. never had a fraudulent intent but always acknowledged orally the existence and binding nature of the trust.[39]

Why does chancery do this? Were the history of the implied-in-fact and the so-called "implied-in-law" trusts to be forgotten, it would seem as if there could be but one logical answer, namely, that when the presumption of a gift was rebutted by showing that a gift was not intended and a trust was, all presumptions of fact were at an end, and the situation was then one of an oral trust of land, a repudiation of that trust by the trustee, and an attempted unjust enrichment of the trustee by the retention for his own use of the trust *res* at the expense of the buyer of the property. In other words, on principle, the trust, and, in the absence of a controlling historical development to the contrary, the only trust for chancery to declare and enforce would seem to be a constructive trust.

But the historical development of the trust doctrine has been against that analysis. If, as just suggested, this kind of a trust is different from the ordinary resulting trust, most of the courts have not been aware of it. The typical resulting trust has been where A. has paid for property and B. has conveyed it at A.'s request to C., who was not related to A. There chancery indulged the presumption of fact — rebuttable, as such presumptions normally are — that C. was to hold in trust for A. But if C. was A.'s wife a presumption of gift was indulged. Without noticing that this presumption of gift was on principle the only presumption where C. was A.'s wife, the chancery judges regarded the presumption of a trust as the first one entertained and as rebutted by proof of the relationship of the parties, with the consequent presumption of fact of a gift. Then when that presumption of fact of a gift

946 (1899); Andrew *v.* Andrew, 114 Ia. 524, 87 N. W. 494 (1901); Mullong *v.* Schneider, 155 Ia. 12, 134 N. W. 957 (1912). Compare Johnson *v.* Ludwick, 58 W. Va. 464, 52 S. E. 489 (1906); Ludwick *v.* Johnson, 67 W. Va. 499 (1910).

[39] Sherman *v.* Sherman, 20 D. C. 330 (1892); Bachseits *v.* Leichtweis, 256 Ill. 357, 100 N. E. 197 (1912); Cotton *v.* Wood, 25 Ia. 43 (1868); Price *v.* Kane, 112 Mo. 412, 20 S. W. 609 (1892); Bartlett *v.* Bartlett, 15 Neb. 593, 19 N. W. 691 (1884); Bailey *v.* Dobbins, 67 Neb. 548, 93 N. W. 687 (1903); Lahey *v.* Broderick, 72 N. H. 180, 55 Atl. 354 (1903); Yetman *v.* Hedgeman, N. J. Eq. (1913), 88 Atl. 206; Hickson *v.* Culbert, 19 So. Dak. 207, 102 N. W. 774 (1905); Bickford *v.* Bickford's Estate, 68 Vt. 525, 35 Atl. 471 (1896). See Corr's Appeal, 62 Conn. 403, 26 Atl. 478 (1892). Compare Livingston *v.* Livingston, 2 Johns. Ch. (N. Y.) 537 (1817). But see Chapman *v.* Chapman, 114 Mich. 144 (1897); Ryan *v.* Williams, 92 Minn. 506 (1904).

was itself rebutted, by evidence of an express oral trust undertaken by C. as trustee for A. as *cestui*, the equity courts regarded the original presumption of fact of a trust as remaining in undisputed control of the field.[40]

The artificiality of indulging the *presumption of fact of a trust* when presumptions of fact are unnecessary because of *actual proof of an express trust* is apparent. Where the presumption of a gift, indulged because C. is A.'s wife, is rebutted by circumstances raising a fair inference that a gift was not intended — as where A. pays for the property with the only money or other property that he owns and therefore will be left penniless if a gift is presumed [41] — it is of course fair to say that the original presumption of a trust is still there to carry the day in favor of the resulting-trust view of the transaction; but it certainly seems wrong on principle to say that any inference of a trust, *i. e.*, any presumption of a trust, can have any vitality after *inference* of a trust has given way to *demonstration* of an express trust. The trust which is enforced where the presumption of a gift by the buyer of property to his wife or child, to whom it is conveyed at his request, is overcome by proof of an express oral trust for him, and in breach of which the property is withheld, should be recognized as a constructive trust. The same is true, it would seem, where the buyer has the property conveyed to a legal stranger who orally agrees to hold for the buyer. The oral agreement ought not to prevent the enforcement of a trust, but the trust is logically not resulting but constructive.[42] If A. pays B. and the conveyance is made to C.,

[40] See Smithsonian Institution *v.* Meech, 169 U. S. 398, 411, 18 Sup. Ct. 396 (1897).

[41] See Skahen *v.* Irving, 206 Ill. 597, 69 N. E. 510 (1903).

[42] These statements are made with some reluctance, because in some jurisdictions correct decisions rendered in cases where the courts thought they had before them resulting trusts would probably be overruled, under the influence of the doctrine of *stare decisis*, if the courts were convinced that the so-called resulting trusts were really constructive. Unfortunately this probably would be the result in Illinois, in which state, for a constructive trust to arise where property is conveyed on an oral trust for either the grantor or for third persons, the court has pretty consistently required either an actual fraudulent intent on the part of the grantee, or undue influence by him exerted on the grantor, at the time of the conveyance (see the trust for grantor cases: Stevenson *v.* Crapnell, 114 Ill. 19, 28 N. E. 379 (1885); Lawson *v.* Lawson, 117 Ill. 98, 7 N. E. 84 (1886); Biggins *v.* Biggins, 133 Ill. 211, 24 N. E. 516 (1890); Champlin *v.* Champlin, 136 Ill. 309, 26 N. E. 526 (1891); White *v.* Ross, 160 Ill. 56, 43 N. E. 336 (1895); Mayfield *v.* Forsyth, 164 Ill. 32, 45 N. E. 403 (1896); Williams *v.* Williams, 180 Ill. 361, 54 N. E. 229 (1899); Benson *v.* Dempster, 183 Ill. 297, 55 N. E. 651 (1899); Skahen *v.* Irving, 206 Ill. 597, 69 N. E. 510 (1903); Lancaster *v.* Springer, 239 Ill. 472,

who is no relative of A.'s but who expressly though orally promises to hold in trust for A., there is no more room for the indulgence of a presumption of a trust than there would be if the express trust were manifested in writing; and wherever the constructive-trust doctrine is properly apprehended there is no more need for the indulgence of that presumption.

As this is an article regarding proper classification, principle can be accorded first place, and accordingly some trusts heretofore regarded as resulting will be classed as constructive. So far two kinds of trusts commonly accepted as resulting have been found to be excluded on principle from such implied-in-fact trusts, and therefore thrown among imposed-by-law or constructive trusts. They are (*a*) Where A. pays the purchase money and B., the vendor, deeds to C., who is not A.'s wife or child and is not one to whom A. stands *in loco parentis*, and who takes on an express oral trust for A., and later C. or his heir, in reliance on the Statute of Frauds, repudiates the trust and not only refuses to give up the trust *res* but claims it as his own, and (*b*) Where A. pays B. the purchase money and B. deeds to C., who is A.'s wife or child or one to whom A. stands *in loco parentis*, and the presumption of a gift is rebutted by proof that C. took title on an express oral trust for A., and where C. or C.'s heir has repudiated the trust, in reliance on the Statute of Frauds, and not only refuses to give up the trust *res* but claims it as his own.

88 N. E. 272 (1909); Stubbings *v.* Stubbings, 248 Ill. 406, 94 N. E. 54 (1911). Compare Moore *v.* Horsley, 156 Ill. 36, 40 N. E. 323 (1895); McHenry *v.* McHenry, 248 Ill. 506, 94 N. E. 84 (1911). And see the trust for third person cases: Hovey *v.* Holcomb, 11 Ill. 660 (1850); Smith *v.* Hollenback, 51 Ill. 223 (1869); Lantry *v.* Lantry, 51 Ill. 458 (1869); Fischbeck *v.* Gross, 112 Ill. 208 (1884); Donlin *v.* Bradley, 119 Ill. 412, 10 N. E. 11 (1887); Larmon *v.* Knight, 140 Ill. 232, 29 N. E. 1116 (1892); Davis *v.* Stambaugh, 163 Ill. 557, 45 N. E. 170 (1896); Crossman *v.* Keister, 223 Ill. 69, 79 N. E. 58 (1906); Ryder *v.* Ryder, 244 Ill. 297, 91 N. E. 451 (1910). Compare Evans *v.* Moore, 247 Ill. 60, 93 N. E. 118 (1910), or a special confidential relation which would make retention of the *res* by the grantee a shocking betrayal of confidence. See Pope *v.* Dapray, 176 Ill. 478, 52 N. E. 58 (1898); Stahl *v.* Stahl, 214 Ill. 131, 73 N. E. 319 (1905); Hilt *v.* Simpson, 230 Ill. 170, 82 N. E. 588 (1907); Ward *v.* Conklin, 232 Ill. 553, 83 N. E. 1058 (1908); Noble *v.* Noble, 255 Ill. 629, 99 N. E. 631 (1912). Were the Illinois Supreme Court to accept the view that where A. buys property and has it conveyed to his wife or child on an oral trust for him, the trust is not resulting — in Bachseits *v.* Leichtweis, 256 Ill. 357, 100 N. E. 197 (1912), it was deemed resulting — it would probably deny him relief rather than adopt the fraudulent retention basis for raising constructive trusts. See Murray *v.* Murray, 153 Ind. 14, 53 N. E. 946 (1899); Andrew *v.* Andrew, 114 Ia. 524, 87 N. W. 494 (1901); Mullong *v.* Schneider, 155 Ia. 12, 134 N. W. 957 (1912). Compare Godschalk *v.* Fulmer, 176 Ill. 64, 51 N. E. 852 (1898).

III.

Constructive Trusts.

Constructive trusts may be subdivided in various ways for classification purposes, but it would seem as if only three kinds of constructive trusts need be indicated here, namely, (1) those so-called resulting trusts which are really constructive; (2) those other constructive trusts which grow out of non-written trusts of land; (3) all other constructive trusts.

Some of the so-called resulting trusts that really are constructive have already been discussed. They are cases (*a*) and (*b*) last above mentioned.

So, too, it is frequently said that there is a resulting trust (*c*) where A. without authority uses the funds of B. to buy lands conveyed to A.,[43] but as the trust is not one of intention but is strictly a trust *in invitum* it seems clear that such a trust is not resulting but is constructive.[44]

Closely connected with the above are some constructive trusts recognized in some jurisdictions, which grow out of non-written trusts of land and are deserving on historical grounds, since they are the modern substitute for the original resulting uses, of being mentioned next to the foregoing constructive trusts, namely, (*d*) where A. without consideration conveys to C. upon an express oral trust for A. (the express oral trust rebutting the presumption of no trust found in the recitation of consideration and in the *habendum* to the use of C. contained in the deed), and C. or C.'s heir repudiates the trust in reliance on the Statute of Frauds and on the parol-evidence rule, and where, in addition to repudiating the trust, C. or C.'s heir claims as his own the trust *res*. This class of constructive trusts is recognized in only a few jurisdictions, and outside of England and of one or two American jurisdictions is recognized practically only where there is a breach of a special confidential relation or where the grantee solicited and thereby unduly influenced the conveyance or had an actual fraudulent intent at the time he made the promise.[45]

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[43] See 39 Cyc. 148–152. [44] See Shearer *v.* Barnes, 118 Minn. 179 (1912).

[45] The English cases seem to make no distinction between the case of actual fraudulent intent at the time of conveyance and the case where there is an actual fraudulent

Next to the latter class of constructive trusts should be classed those constructive trusts (*e*) where A. conveys to C. or devises to C. upon an express oral trust for X. and the events specified in case (*d*) take place.

All other trusts imposed and enforced because of actual or constructive fraud may be left undivided and be lettered as subdivision (*f*) of constructive trusts.

Our classification being now complete, it is desirable to arrange our results in diagrams. Since we began by giving Maitland's diagram, it will be well to note what rearrangement in his diagram our discussion compels us to make. We must, of course, eliminate the word "implied," except as qualified by the words "in fact." Those qualifying words are rendered necessary by the traditional view that trusts can be implied by law. Then we must throw resulting trusts under the head of trusts by act of a party, rather than under the head of trusts by act of the law.

Our rearrangement of Maitland's diagram is:

Trusts { 1. By act of a party { (*a*) Express. (*b*) Implied in fact or resulting. 2. By act of the law (*a*) Constructive.

But we can omit the headings "by act of a party" and "by act of the law," since our classification of trusts as express, implied in

intent only at the time of the refusal to perform, and seem to regard the refusal to perform when coupled with retention of the property as necessarily fraudulent enough for constructive trust purposes. Davies *v.* Otty, 35 Beav. 208 (1865); Haigh *v.* Kaye, L. R. [1872] 7 Ch. App. 469; Booth *v.* Turle, L. R. [1873] 16 Eq. 182; Marlborough *v.* Whitehead, [1894] 2 Ch. 133; De La Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, [1898] 1 Ch. 550. For a Canadian case *in accord* see Clark *v.* Eby, 13 Grant Ch. (U. C.) 371. California seems at last to have adopted that rule in Taylor *v.* Morris, 163 Cal. 717 (1912), though the other California cases do not go beyond the limits of fraudulent intent at the start, or breach of a special confidential relationship, prescribed by the general American rule. New York seems to have at least one decision under the English doctrine. See Medical College Laboratory *v.* New York University, 178 N. Y. 153, 70 N. E. 467 (1904); Lang *v.* Lang, 131 N. Y. Supp. 891 (1911). So does Oklahoma. See Flesner *v.* Cooper, 134 Pac. 379 (1913).

A few other jurisdictions which have not rendered decisions contrary to the English rule have published opinions which leave the way open for that rule's adoption. See Bowler *v.* Curler, 21 Nev. 158, 26 Pac. 226 (1891), and Hanson *v.* Svarverud, 18 No. Dak. 550 (1909).

Because of the Statute of Frauds, if it is pleaded and relied on, and in some instances because of the parol-evidence rule, if it is relied on, the vast majority of American jurisdictions will not enforce any trust for a grantor who conveyed on an oral trust for himself or on an oral promise by the grantee to convey or to devise to the grantor, in

fact, and constructive, renders them unnecessary, and then we have the following tentative diagram:

- Trusts
  - A. Intention enforcing
    - I. Express
      - (*a*) Manifest without interpretation
      - (*b*) Ascertained or clarified by construction
        - (1) Precatory trusts.
        - (2) Where property is conveyed by voluntary deed or is disposed of by will in trust, where the express trusts specified in writing fail in whole or in part, and where there is no express oral trust purporting to dispose of the equitable interests which fail.
        - (3) Other construed trusts.
    - II. Implied in fact or "resulting"
      - (*a*) Where A. pays B. who conveys to C. who is not A.'s wife or child and is not one to whom A. stands *in loco parentis*, and no express trust, either written or oral, is shown.
      - (*b*) Where A. pays B. who conveys to C. who is A.'s wife or child or one to whom A. stands *in loco parentis*, but where the fact that A. used up all his property in the purchase or some other circumstance makes it unreasonable to infer a gift, and where no express trust, either written or oral, is shown.
  - B. Fraud rectifying
    - I. *In invitum* or "constructive"
      - (*a*) Where A. pays B. who conveys to C. who is not A.'s wife or child and is not one to whom A. stands *in loco parentis*, and who takes upon an express oral trust for A., which later he or his heir repudiates, in reliance on the Statute of Frauds, and where, in addition to repudiating the trust C. or C.'s heir claims as his own the trust *res*.
      - (*b*) Same as (*a*), only C. is A.'s wife or child or one to whom A. stands *in loco parentis*.
      - (*c*) Where A. without authority uses B.'s funds to buy lands deeded to A.
      - (*d*) Where A. without consideration conveys to C. by a deed which recites a consideration and has an *habendum* to C.'s use, but on an express oral trust for A., and where C. or C.'s heir repudiates the trust, in reliance on the Statute of Frauds and the parol-evidence rule, and retains the *res* as his own.
      - (*e*) Where A. conveys to C. as in (*d*) or devises to C. upon an express oral trust for X. and where C. repudiates and retains the *res* as in (*d*) in reliance on the Statute of Frauds, and the parol-evidence rule, or on the Statute of Wills, or on both the Statute of Frauds and the Statute of Wills.
      - (*f*) All other trusts which are neither express nor resulting and which therefore are imposed and enforced because of actual or constructive fraud.

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the absence of a special confidential relationship between the parties or of undue influence or actual fraudulent intent on the part of the grantee found to have existed at the time of the conveyance. The Illinois oral-trust-for-the-grantor cases cited in note 42, *ante*, are typical of the general American view as to the claims of the grantor.

In Massachusetts no trust will be enforced for the grantor (Walker *v.* Locke, 5 Cush. 90 (1849); Titcomb *v.* Morrell, 10 Allen, 15 (1865); Blodgett *v.* Hildreth, 103 Mass. 484 (1870); Gould *v.* Lynde, 114 Mass. 366 (1874); Fitzgerald *v.* Fitzgerald,

There is no doubt that the foregoing diagram can be improved upon both in form and in substance. It is submitted only tentatively and as a basis for clarifying discussion. The sole justification for it and for this whole classification article is that a correct classification will be an aid to correct decision. No court of law would to-day give a greater effect to a breach of an implied-in-fact contract than it gives to a breach of an express contract for the same thing, and surely no court of equity that understood clearly that a resulting trust is an implied-in-fact trust enforced to prevent fraudulent retention would give fraudulent retention less weight when it follows an express oral trust than when it follows an implied-in-fact unwritten trust. The fact that the Statute of Frauds forbids the enforcement of the express oral trust while it expressly permits the enforcement of the implied-in-fact resulting trust is no justification for the attitude of chancery in those jurisdictions where the retention of the trust *res* in violation of the express oral trust is not deemed a constructive trust, for those courts ought to deem such action to raise a constructive trust, and if they did, its enforcement would be expressly authorized by the Statute of Frauds.

Correct judicial decisions do not always follow correct legal theory even when that theory is accepted, for correct theory may be misapplied, but the best hope of correct decision lies in the adoption of the best legal theory of rights and remedies. That is the sole excuse for an attempt to correct certain erroneous notions of the nature of resulting and of constructive trusts; but, since those erroneous notions are at times the reason for chancery's failure to furnish the appropriate remedy for fraudulent enrichment, it would seem to be a sufficient excuse for the attempt.

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168 Mass. 488, 47 N. E. 431 (1897); Curry *v.* Dorr, 210 Mass. 430, 97 N. E. 87 (1912)); but the grantor can recover a money judgment for the value of the lands. See Basford *v.* Pearson, 9 Allen (Mass.) 387 (1864); O'Grady *v.* O'Grady, 162 Mass. 290, 38 N. E. 796 (1894); Cromwell *v.* Norton, 193 Mass. 291, 79 N. E. 433 (1906). Compare Dix *v.* Marcy, 116 Mass. 416 (1875). While that view is not as satisfactory as is the English doctrine, it is not as unsatisfactory as is the general American doctrine. See Ames, Lectures on Legal History, 428; 20 HARV. L. REV. 549, 552.